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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

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FILED

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No. 1473

121

UNITED STATES OF AMERICA,

Petitioner,

versus

**JORDAN JAMES SULLIVAN, TRADING AS
SULLIVAN'S PHARMACY,**

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO THE
GRANT OF THE WRIT OF CERTIORARI.**

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Respondent, Jordan James Sullivan, respectfully submits that the Circuit Court of Appeals did not err in reversing the judgment of the District Court, and that the grant of the writ in this case should be denied for the following reasons:

I.

IT IS NOT THE PURPOSE OR INTENT OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT TO REGULATE THE INTRASTATE, OVER-THE-COUNTER RETAIL SALES OF FOODS, DRUGS, COSMETICS AND DEVICES, OR TO PRESCRIBE HOW AND IN WHAT MANNER SUCH ARTICLES, WHEN SO SOLD, SHOULD BE LABELED OR BRANDED.

The purpose of the Act, as plainly and clearly expressed in its title, is to prohibit the movement in interstate com-

merce of adulterated and misbranded foods, drugs, cosmetics and devices. The Act is in aid of, and not a usurpation of, the police powers of the several states, to the end that the public health and safety might be advanced. The Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce. It does not interfere with state regulations of selling at retail. The construction urged by the government would give a federal agency control over myriads of local businesses in matters heretofore traditionally left to local law, and would really be a direct regulation for police purposes of what is plainly intrastate commerce, which is peculiarly the province of the state. Such a construction would be an inroad upon local conditions and standards of such far-reaching import as would destroy the distinction which the commerce clause itself established between commerce among the several states and the internal concerns of a state.

Weigle vs. Curtice, 248 U. S. 285.

Federal Trade Commission vs. Bunte Bros., 312 U. S. 342.

National Labor Relations Board vs. Jones, 301 U. S. 1.

U. S. vs. Walsh, 67 S. C. T. 1283.

But it is said that to deny the Food and Drug Administration the right to regulate purely intrastate retail sales would seriously impair the functioning of the administration, and would defeat the purpose of the Act. This certainly is not true if the purpose of the Act is to keep interstate channels free of adulterated and misbranded articles, and the administration will confine its function-

ing to such purposes. To say that the public health will not be protected if the administration does not have power to regulate retail sales is to say that the several states will not, or cannot, enforce their laws, for such laws are unquestionably adequate. But the administration wants a completely centralized control, and not a dual system as created by our Constitution and as has existed until now. The administration's function is to keep adulterated and misbranded articles out of interstate commerce so that the state regulation of local retail selling will be more effective in protecting the health and safety of its citizens.

II.

SECTION 301K, AND PARTICULARLY THAT PART OF SAID SECTION READING: "OR THE DOING OF ANY OTHER ACT WITH RESPECT TO A FOOD, DRUG . . . IF SUCH ACT IS DONE WHILE SUCH ARTICLE IS HELD FOR SALE AFTER SHIPMENT IN INTERSTATE COMMERCE AND RESULTS IN SUCH ARTICLE BEING MISBRANDED", IS TOO VAGUE, UNCERTAIN AND INDEFINITE AS APPLIED TO ACTS OF RESPONDENT TO BE ENFORCEABLE AS A CRIMINAL STATUTE.

A criminal statute should be definite and certain. It should define its orbit with exactitude so that a citizen may be aware of the penalties attendant upon a certain course of conduct. The dividing line between unlawful and lawful acts should not be left to conjecture; there should be no constructive offenses. Liberty is a precious attribute; fine and imprisonment are harsh deterrents. The prohibitive acts should be so clearly expressed and de-

finer that the ordinary person can know in advance how to avoid an unlawful course of conduct and so that only the foolhardy or vicious will be penalized. Respondent insists that no ordinary grocer, druggist, barber, beautician or other retail dealer in foods, drugs, cosmetics and devices would understand from the language of Section 301K that unless he labeled an article sold over-the-counter in the manner prescribed by the Act that he would be guilty of a crime punishable by fine and imprisonment.

Krause vs. U. S., 327 U. S. 614.

U. S. vs. Resnich, 299 U. S. 207.

Fasulo vs. U. S., 272 U. S. 620.

U. S. vs. Weitzel, 246 U. S. 533 (at page 543).

U. S. vs. Harris, 177 U. S. 305.

U. S. vs. Wiltberger, 5 Wheaton 76.

III.

IF THE ACT IS CONSTRUED AS APPLIED TO RESPONDENT'S INTRASTATE ACTS, THEN SAID ACT IS INVALID AND UNCONSTITUTIONAL IN THAT IT IS IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IS AN INVASION OF THE RESERVED POLICE POWERS OF THE STATE.

The Respondent's acts were purely intrastate, and after the interstate commerce had ended. No conspiracy or fraudulent intent was alleged or shown. Such retail sales could no more have affected interstate commerce than the retail sale of like articles domestically produced. Such sales did not and could not directly or substantially, bur-

den or obstruct interstate commerce or in any wise prevent the government from keeping out of the channels of interstate commerce, adulterated or misbranded articles. Congress does not have the power to regulate intrastate commerce, irrespective of its effect upon interstate commerce. This Act, if construed as the government contends, is clearly unconstitutional and invalid.

Shechter Poultry Corp. vs. U. S., 295 U. S. 495.

To adopt the construction of the Act urged by the administration in this case would be to destroy the power of the state to regulate the retail sale of foods and drugs, and to deny the right of the state to protect the health and safety of its citizens under the police powers reserved to it under the Constitution.

Respondent submits that the decision of the Circuit Court is not erroneous for any of the reasons assigned, and that the writ of certiorari should be denied.

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